

IN THE STATE COURT OF BIBB COUNTY  
STATE OF GEORGIA

**COPY**

LESTER E. KIRKLAND, JR.,  
PLAINTIFF

"

"

VS

Civil Action No.

"

NORFOLK SOUTHERN  
RAILWAY COMPANY,  
DEFENDANT

"

45273

TRIAL

held before

HON. WILLIAM P. ADAMS

and a JURY

VOLUME ~~II~~ <sup>IV</sup> of ~~II~~ <sup>IV</sup>

March 21, 2001

9:00 a.m.

Bibb County Courthouse  
Macon, Georgia

REPORTED BY: Julia J. Scarborough

HAWTHORNE & WEBB COURT REPORTING  
P.O. Box 539  
Macon, Georgia 31202-0539  
(478) 746-2295 & (478) 477-9356

1 CHARGE BY THE COURT

2 THE COURT: Ladies and Gentlemen, you have now  
3 heard the evidence in the case as well as the argument of  
4 counsel in this case of Lester E. Kirkland, Jr., as the  
5 Plaintiff, against Norfolk Southern Railway Company, as  
6 the Defendant, in which case the Plaintiff is seeking to  
7 recover, at your hands, a verdict, for injuries and  
8 damages alleged to have been sustained by him as a result  
9 of events alleged to have occurred in January 1998 near  
10 Warrentonville, South Carolina. It is now my duty to  
11 instruct you on the law that applies in the case. The  
12 case was originally brought to Court by the filing of a  
13 -- what we call a Complaint, and that is the written  
14 statement of the Plaintiff's positions, which the  
15 Defense, the railway company, responded with their  
16 Answer. Those are what we call the pleadings in the  
17 case. They will not be out in evidence with you. They  
18 are not evidence themselves and have no probative value.  
19 I simply tell you that to help you to understand how a  
20 case comes to be in court. In this case, the railway  
21 company's agent is in Macon, and that's why the suit is  
22 filed in Bibb County, Georgia. Now, you must consider  
23 this case as a lawsuit between persons of equal worth and  
24 equal standing in the community, in between persons  
25 holding the same or similar positions in life. All

1 persons stand equal under the law and before the law. In  
2 a Court of justice, all persons are to be dealt with as  
3 equals. A business entity, such as a corporation, here  
4 Norfolk Southern Railway Company, is to be regarded as a  
5 person in this instance for the sake of this charge I am  
6 giving you, that again, in a Court of justice all persons  
7 will be dealt with as equals. Now, you have heard the  
8 evidence in the case and you are familiar with the  
9 contentions of fact by the respective parties. I will  
10 not attempt to review or summarize those contentions,  
11 except insofar as may be necessary for me to give you the  
12 law that is applicable to the case. Now, the law I am  
13 going to give you is generally in three categories.  
14 First, we are going to talk about the burden of proof and  
15 your consideration of the evidence; and then we are going  
16 to talk about the liability issues under the law; and  
17 finally, we will talk about damages.

18 First, the burden of proof. The burden of proof is  
19 on the Plaintiff in this case to make out his case by  
20 what is called a preponderance of the evidence.  
21 Similarly, the burden is on the Defendant to make out its  
22 case as to any affirmative defense it may have, and I  
23 will talk about those with you in a little bit, but also  
24 by a preponderance of the evidence. A preponderance of  
25 the evidence; by those terms, a preponderance of the

1 evidence is meant that superior weight of evidence upon  
2 the issues involved, which, while not enough to wholly  
3 free your mind from a reasonable doubt, is sufficient to  
4 incline a reasonable and impartial mind to one side of  
5 the issue rather than to the other, that's the burden of  
6 proof, preponderance of the evidence. Now in determining  
7 where the preponderance of the evidence lies in the case,  
8 you may consider all the facts and circumstances of the  
9 case itself, you may consider the witnesses manner of  
10 testifying, their intelligence, their means and  
11 opportunity for knowing the facts to which they testify,  
12 the probability or improbability of their testimony, the  
13 nature of the facts to which they testify, their interest  
14 or lack of interest in the case, and also their personal  
15 credibility insofar as that may legitimately appear from  
16 the trial of the case. Credibility simply means  
17 believability, and in that regard, you will determine the  
18 credibility of each witness as you weigh the evidence in  
19 the case. You may also consider the number of witnesses,  
20 though the preponderance is not necessarily with a  
21 greater number. But the point is, is that you make all  
22 decisions as to the facts of this case under the law as  
23 given you in this charge. In doing so, I charge you,  
24 that you as jurors can use and apply your general  
25 knowledge and experience in life, your common sense as



1 adults in considering the case. Now, ordinarily the  
2 Court receives testimony of witnesses only as to facts to  
3 which they have particular and direct knowledge, but in  
4 cases of the science or various professions, such as  
5 medical professions or economics, where a particular  
6 knowledge may be required to understand the situation,  
7 the law does allow those persons, deemed to be experts,  
8 to give their opinions based upon certain facts. The  
9 opinion testimony of expert witnesses can be based either  
10 upon hypothetical questions or based on their  
11 observations of the facts themselves. You should not  
12 consider any opinion at all unless the facts upon which  
13 it is based are found by you to be true and correct.  
14 Even though you are allowed to receive the testimony of  
15 experts, you are not bound by any such testimony, it is  
16 not conclusive on you, rather the law allows you to  
17 receive it and consider it along with all the other  
18 evidence in the case, and that is the manner in which you  
19 should consider it. An expert may aid a jury, but an  
20 expert can not perform the function of a jury. It is  
21 your duty in this case, Members of the Jury, to reconcile  
22 the evidence, and thus make each witness, if possible,  
23 speak the truth. However, if after a consideration of  
24 the case you are unable to reconcile the testimony of a  
25 witness or witnesses or there is a conflict in your

1 judgement in the testimony of witnesses, which you are  
2 unable to reconcile, so as to make each witness speak the  
3 truth, then you should believe such witness or witnesses  
4 as you think are most entitled to believe, and that's  
5 your job. Now, you take the law of this case from the  
6 Court, and after applying the law as given you in this  
7 charge, to the facts as you find those facts to be, you  
8 will then write your verdict, which speaks the truth of  
9 the case. The object of this investigation, and indeed  
10 the object of all legal investigations, is the discovery  
11 of the truth.

12 All right, now I am going to talk to you about the  
13 second thing I mentioned, that is, liability, legal  
14 principles that apply here. And during the course of the  
15 charge I am about to give you, I will, of necessity, use  
16 terms relating to negligence. But I charge you that in  
17 using any term relating to negligence, the Court itself,  
18 I am not intimating, suggesting or expressing an opinion  
19 that anyone was or was not negligent in any respect. And  
20 again, that's your job to determine. The term as used by  
21 the Court is subject to the qualification and condition  
22 that you, Members of the Jury, may find such negligence  
23 on the part of the party to whom the term might refer.  
24 Again, you Members of the Jury are the sole judges of the  
25 facts of the case, and the Court has no opinion and

1 expresses no opinion concerning any facts, since that is  
2 entirely left to you to resolve. And in this case,  
3 Members of the Jury, the Plaintiff's claims are asserted  
4 under what is known as the Federal Employer's Liability  
5 Act, which is sometimes called, F-E-L-A, FELA. And you  
6 will hear me just call it FELA, I am not going to say,  
7 Federal Employer's Liability Act every time I mention  
8 it. I will say FELA, but you will know what I am talking  
9 about. This act provides that every common carrier, by  
10 railroad, while engaged in commerce between any of the  
11 several states shall be liable in damages to any of its  
12 employees who are injured as a result of negligence by  
13 the railroad, that's the federal law that applies here.  
14 Now, this law, as to railroad employees, is to be  
15 distinguished from the State Workers' Compensation Law,  
16 which you may have some familiarity with, or not, but  
17 those laws do not require showing a fault or negligence.  
18 Railroad employees are, again, covered by FELA, and not  
19 by State Workers' Compensation laws, so you must follow  
20 these instructions I am about to give you on the FELA law  
21 as it applies here to the Plaintiff's case. And this  
22 case, the Plaintiff claims that the Defendant failed to  
23 exercise reasonable care to provide him with a reasonably  
24 safe place in which to work and reasonably safe rail cars  
25 and conditions in which to work. In that regard, Members

1 of the Jury, I charge you that the Plaintiff must prove,  
2 by a preponderance of the evidence, that the Defendant  
3 knew, or in the exercise of ordinary care, should have  
4 known, that such a condition existed and that it had a  
5 reasonable opportunity to either warn the Plaintiff of  
6 the existence of the condition or to remedy that  
7 condition. So in order to prevail on his claim, the  
8 Plaintiff in this case, Members of the Jury, must prove  
9 by a preponderance of the evidence, first, that the  
10 Defendant was negligent as he claims; and second, that  
11 such negligence was a legal cause of the damage that was  
12 sustained by him. So the first issue for you to decide  
13 is whether the Defendant or any of its employees, other  
14 than the Plaintiff, was negligent, and if so, whether  
15 such negligence was the legal cause of any damage  
16 sustained by the Plaintiff. Under FELA, it was the  
17 continuing duty of the Defendant railroad to use  
18 reasonable care, under the circumstances, in furnishing  
19 the Plaintiff with a reasonably safe place in which to  
20 work and to use reasonable care, under the circumstances,  
21 to maintain and keep such place of work in a reasonably  
22 safe condition. Now this does not mean that the  
23 Defendant railroad was a guarantor or insurer of the  
24 Plaintiff's safety, and the mere fact that an accident  
25 happened, standing alone, does not require the conclusion

1           that the incident was caused by anyone's negligence. The  
2           extent of the Defendant's duty is to exercise reasonable  
3           care under the circumstances to see that the place in  
4           which the work is to be performed by its employees is  
5           reasonably safe. The railroad's duty in this regard, to  
6           provide Plaintiff a safe place to work, is a  
7           non-delegable duty, that is, it may not be delegated to  
8           anyone by the railroad. Now negligence, Members of the  
9           Jury, is a failure to use reasonable care. Reasonable  
10          care is that degree of care which a reasonably careful  
11          and prudent person would use under like and similar  
12          circumstances. Negligence may consist, either in doing  
13          something that a reasonably careful person would not do  
14          under like circumstances, or in failing to do something  
15          that a reasonably careful person would do under like  
16          circumstances. For purposes of this action, negligence  
17          is a legal cause of damage if it played any part, no  
18          matter how small, in bringing about or actually causing  
19          the injury or damage to Plaintiff. So if you should find  
20          from the evidence in this case, that any negligence of  
21          the Defendant contributed in any way toward any injury or  
22          damages suffered by Plaintiff, you may find that such  
23          injury or damage was legally caused by the Defendant's  
24          negligence. Now, you are also instructed that  
25          Defendant's negligence, if you so find, may be a legal

1        cause of damages, even though it operates in combination  
2        with the act of another, or some natural cause, or some  
3        other cause, if such other cause occurs at the same time  
4        as the Defendant's negligence, and if the Defendant's  
5        negligence played any part, no matter how smart, in  
6        causing such damage. Now if a preponderance of the  
7        evidence in this case does not support the Plaintiff's  
8        claim under FELA for negligence, then your verdict would  
9        be for the Defendant as to the Plaintiff's claims based  
10       on negligence. If, however, a preponderance of the  
11       evidence does support the Plaintiff's claim on negligence  
12       then you would then consider the defenses raised by the  
13       Defendant. Here the Defendant has asserted that the  
14       Plaintiff was contributorily negligent, and that the  
15       Plaintiff failed to mitigate his damages. These defenses  
16       are known as affirmative defenses and as to these  
17       defenses, the Defendant has the burden of proof, as I  
18       mentioned to you earlier. Affirmative defenses are  
19       covered by the same rules of law that govern the  
20       Plaintiff's claim, that is, the Defendant must prove any  
21       such defense by a preponderance of the evidence. Now the  
22       Defendant contends that the Plaintiff, Mr. Kirkland, was  
23       himself negligence, and that such negligence was the  
24       legal cause of his own injury. Railroad employees,  
25       Members of the Jury, do have a continuing duty to

1 exercise due care for their own safety under the facts  
2 and circumstances of the case. Here the Defendant claims  
3 that the Plaintiff was negligent in the way and manner in  
4 which he chose to perform his job. The burden of proving  
5 that claim, by a preponderance of the evidence, is upon  
6 the Defendant, who must establish first that the  
7 Plaintiff was also negligent, as that term has just been  
8 defined for you by me in this charge; and second, that  
9 such negligence was a legal cause of the Plaintiff's own  
10 damage. So if you find in favor of the Defendant on this  
11 defense, understand that that will not prevent a recovery  
12 by the Plaintiff, it only reduces the amount of the  
13 Plaintiff's recovery. In other words, if you find that  
14 the incident was due partly to the fault of the  
15 Plaintiff, that is, his own negligence was, for example,  
16 I'm just going to say "X" percent, if he was to some  
17 percentage responsible for his own damage, then you would  
18 reduce the amount of his reward by that amount, and it  
19 could be 10 percent, it could be 20 -- whatever figure  
20 you were to determine that the Plaintiff was at fault,  
21 there is a percentage -- understanding that percentage  
22 must add up to 100 between the parties, the Plaintiff and  
23 the Defendant. If you decide he is negligent in some  
24 proportion, then you would reduce his award by that  
25 amount. Again, such a finding of negligence on the part

1 of the Plaintiff would not prevent a recovery, it would  
2 just reduce the total damages by the percentage you find.

3 As I say, if you find the Defendant was negligent, you  
4 might find it was 1 percent or 99 percent, or anywhere in  
5 between, so long as, again, the figures of fault between  
6 the two parties add up to 100 percent. Now, if you find  
7 from the evidence that the sole legal cause of the  
8 Plaintiff's injury, if any, was his own negligence, that  
9 is 100 percent was on the Plaintiff, if you find he was  
10 negligent, then in that event, the Plaintiff could not  
11 recover against the Defendant, and it would be your duty  
12 to return a verdict against -- or for the Defendant.

13 Now, I charge you under our law, as given you in this  
14 charge, if you should find that the Plaintiff is entitled  
15 to recover in the case, and in considering his damages,  
16 if any, it would be your duty to take into consideration  
17 the following principle of law; and that is, that the  
18 Plaintiff is now, will be in the future, and was at all  
19 times in the past bound to lessen or mitigate his  
20 damages, if any, as attributable to the Defendant's  
21 negligence, if any, as far as practicable by the use of  
22 ordinary care and diligence on the Plaintiff's part. The  
23 Defendant railroad company has the burden of proving that  
24 Plaintiff failed to mitigate his damages by a  
25 preponderance of the evidence. And in connection with



1           that burden, I charge you that the Plaintiff does have a  
2           duty to mitigate his damages by returning to some type of  
3           employment as soon as reasonably possible. Plaintiff was  
4           not required to accept employment if the place of  
5           employment was in an unreasonably, as you may so find,  
6           distant geographical area from the area where he lived at  
7           the time of his injury. Loss of wages is a consequence  
8           of the employee's failure to return to gainful  
9           employment, when that is by the employee's own choice,  
10          rather than as a legal result of the Defendant's conduct,  
11          is not recoverable. That's the concept of mitigation of  
12          damages. Now, if after applying the rules of law as  
13          given to you in this charge, to the facts as you find  
14          those facts to be, you conclude that the Plaintiff in  
15          this case is not entitled to recover, you would end your  
16          investigation at that point and return your verdict for  
17          the Defendant. If, on the other hand, you find that the  
18          Plaintiff is entitled to recover, you would go a step  
19          further and take up the question of damages to be  
20          awarded.

21                 And in that connection, I charge you as follows. So  
22                 now, I am talking about the third thing I told you about,  
23                 and that is, damages. Under FELA, it is the duty of you,  
24                 the jury, to determine the amount of compensation and  
25                 damages, if any, as caused by Defendant's negligence, to

1       award the Plaintiff. In this case, there are three types  
2       of damages and compensation which you may consider,  
3       medical expenses are not one of them, that's not part of  
4       this case. But one is the Plaintiff's past lost wages  
5       and benefits; two, is the present value of the  
6       Plaintiff's future lost wages and benefits; and three, is  
7       the physical pain and mental anguish which Plaintiff may  
8       have suffered in the past, and which you find he is  
9       reasonably certain to suffer in the future, including an  
10      amount to fairly compensate him for any permanent  
11      physical disability which he may have suffered. In  
12      connection with the question of damages, I charge you as  
13      follows: Damages are given as pay or compensation for  
14      injury done, where the law requires one party to pay  
15      damages to another, it seeks to see that the damages  
16      awarded are fair to both parties. If you believe from a  
17      preponderance of the evidence that the Plaintiff is  
18      entitled to recover you should award to him such sums as  
19      you believe are reasonable and just in the case. The  
20      only purpose of an award of damages to the Plaintiff is  
21      to compensate him for injury and damages done, and not to  
22      impose any penalty or punishment on the Defendant. I am  
23      going to charge you on this principle of law concerning  
24      aggravation, or preexisting condition. And that is, I  
25      charge you that a Defendant, when committing a negligent

1        act, takes the injured party as he finds him physically,  
2        and is not allowed to complain that the injury, if found  
3        to be negligently committed, would in a normal person  
4        cause less injury than it does in a person already  
5        impaired. The law is, that an aggravation or a worsening  
6        of the previous condition, or prolonged recovery from an  
7        original condition through additional trauma, negligently  
8        inflicted, is a compensable injury for which damages will  
9        lie. So, if you should find that the Plaintiff received  
10       an injury as a result of the negligence of the Defendant,  
11       either a new injury or an injury that resulted in any  
12       aggravation of a condition already existing, then the  
13       Plaintiff could recover damages for the new injury, or  
14       the aggravation of the preexisting condition. But the  
15       Defendant is not responsible for any physical infirmities  
16       that you may find that the Plaintiff had that were due to  
17       any other causes, other than the alleged incident  
18       involved in this case. And if you find that the  
19       Plaintiff had some other injury, pain, or discomfort,  
20       which is attributable to other causes and not to this  
21       incident, then you could not hold the Defendant  
22       responsible for that injury in this particular case. All  
23       right, in arriving at the amount of an award to be given  
24       to the Plaintiff for past lost wages and fringe benefits,  
25       you may include in your award a reasonable value of the

1 lost income, if any, as shown by the evidence to your  
2 satisfaction, and that may have been necessarily lost up  
3 to the present date by the Plaintiff since the time of  
4 his injury because of his being unable to pursue his  
5 occupation as a result of the injury. In determining  
6 this amount, you should consider any evidence of the  
7 Plaintiff's earning capacity, his earnings, and the  
8 manner in which he ordinarily occupied his time before  
9 the injury, and find that he was reasonably certain to  
10 have earned during the time so lost had he not been  
11 disabled, that's past lost wages. In arriving at the  
12 amount of an award to be given to the Plaintiff for  
13 future lost wages and benefits, you may include in your  
14 award a sum that will reasonably compensate the Plaintiff  
15 for the reasonable value of the time and wages of any  
16 shown by the evidence in the case which will necessarily  
17 be lost in the future by the Plaintiff because of his  
18 injury. In arriving at this amount, of your award, of  
19 any loss of future earnings you should consider what the  
20 Plaintiff's health, physical ability, and earning power  
21 or capacity was before the accident, and what they are  
22 now. You should also consider the nature and the extent  
23 of his injury, and whether his injuries are reasonably  
24 certain to be permanent or not permanent, the extent of  
25 their duration, all to the end of determining, first, the

1 effect if any, of the injury upon future earnings; and  
2 second, the present cash value of any lost future  
3 earnings which you are reasonably satisfied from the  
4 evidence in this case that the Plaintiff is reasonably  
5 certain to lose in the future as a result of the injury.  
6 Present cash value means the sum of money needed now,  
7 which when added to what that sum will reasonably be  
8 expected to earn in the future, will equal such earnings  
9 at the time in the future when these earnings would have  
10 been received, taking into consideration inflation and  
11 future taxation. The award of damages for future lost  
12 earnings must be reduced to present cash value. Adequate  
13 allowance must be made for the earning power of money and  
14 future earnings should be calculated on the length of  
15 time Plaintiff would presently be employed, rather than  
16 on the time he would expect to live. You are entitled to  
17 consider all factors or circumstances, such as illness,  
18 retirement, either compulsory or voluntary, the nature  
19 and hazards of the employment of Plaintiff, accidents,  
20 the possibility of obtaining other suitable employment,  
21 death and other like matters, which might tend to  
22 increase or decrease as a pecuniary loss. No damage  
23 relating to the future may be awarded by you unless it  
24 has been proven to you by a preponderance of the  
25 evidence, not only that the Plaintiff will, in fact,

1           sustain future damages growing out of Defendant's  
2           negligence, if any, but also what the extent of future  
3           damages, if any, will be. Any amounts that you allow for  
4           damages here shall be not subject to income tax,  
5           therefore, you should neither add nor subtract for income  
6           tax in arriving at your verdict.

7           All right, now we are going to talk about pain and  
8           suffering. In arriving at the amount of award to be  
9           given to the Plaintiff, you may include in your award a  
10          sum that would reasonably compensate Plaintiff for any  
11          pain and suffering and mental anguish already suffered by  
12          him resulting from the injury, and which will reasonably  
13          compensate him for any pain and suffering, and mental  
14          anguish, you find from the evidence that he is reasonably  
15          certain to suffer in the future from the same cause.  
16          Your award for pain and suffering should include, not  
17          only the actual physical pain and the mental anguish  
18          suffered by the Plaintiff, but also for any loss of  
19          enjoyment of life, which he has reasonably suffered, or  
20          is already suffering, and is reasonably certain to suffer  
21          in the future, or any physical disability which he has  
22          suffered in the past, which he is reasonably certain to  
23          suffer from in the future. The rule for your use,  
24          Members of the Jury, should you determine that the  
25          Plaintiff is entitled to recover for pain and suffering

1 is your enlightened consciences. As upright and  
2 impartial jurors acting under the sanctity of your oath.  
3 That is the standard for you to use in determining an  
4 award of pain -- of damages for pain and suffering, your  
5 enlightened consciences as upright and impartial jurors  
6 acting under the sanctity of your oaths. All right, that  
7 covers damages.

8 Now, you are not concerned, Members of the Jury,  
9 with the effect of your verdict. And your verdict should  
10 not be based on either prejudice or sympathy for or  
11 against either party in the case. You are only  
12 responsible for your verdict speaking the truth of the  
13 case itself. Now, I am going to send out to you, with  
14 you into the jury room, a form that's called Jury  
15 Verdict, and it has two places, and you will check one of  
16 them. And it says, we the jury find for the, in the  
17 first space where you could check, says Plaintiff, in the  
18 amount of blank dollars, or a place where you can place a  
19 check, Defendant. So the form of your verdict, if you  
20 find for the Plaintiff, would be to check that first  
21 line, and it would then say, we the Jury find for the  
22 Plaintiff in the amount of, and then you would insert the  
23 figure of damages as you come up with. That figure would  
24 be a single figure representing all three elements of  
25 damages that I have explained to you, past lost wages,

1 future lost wages, pain and suffering. You would not  
2 break those figures down into the three categories, you  
3 would insert a single figure that would represent the  
4 total of those elements of damages. Or if your verdict  
5 is for the Defendant, then you would check this second  
6 spot here so that your verdict would then read, we the  
7 Jury find for the Defendant, and your foreperson would  
8 then date it and sign it. So one of your first duties  
9 when you get back there in the Jury room in a minute will  
10 be to elect one of your members to act as foreperson, who  
11 will then preside over your deliberations, and who will  
12 then fill out, date and sign this verdict form as I have  
13 explained, for it then to be returned into the courtroom  
14 to be published. Your verdict must be unanimous, that  
15 is, all 12 of you must freely and voluntarily agree to  
16 whatever verdict you reach. You should start your  
17 deliberations with an open mind, and consult with one  
18 another, consider each other's views. Each of you must  
19 decide the case for yourself, but you should do so only  
20 after discussion and consideration of the case with your  
21 fellow jurors. Do not hesitate to change an opinion if  
22 you are convinced that it's wrong, but you should never  
23 surrender honest convictions or opinions in order to be  
24 congenial, or to reach a verdict solely because of the  
25 opinions of the other jurors. Now, I am going to be ask



1           that you be taken to the Jury room in just a moment, but  
2           do not begin your deliberations until I send out to you  
3           this Verdict form, and also the exhibits that have been  
4           admitted during the trial. We will get those together,  
5           and it may take us a few minutes to get all this  
6           together. But wait for all these items to be sent back  
7           to you in the jury room, and once you have those things,  
8           then you may begin talking about the case with one  
9           another. Everyone remain seated while the jurors are  
10          taken to the Jury room.

11       (JURY LEAVES COURTROOM)

12           THE COURT:       First, though, are there any  
13           exceptions to the charge on behalf of the Plaintiff?

14           MR. WETTERMARK:       Not from the Plaintiff, Your  
15           Honor.

16           THE COURT:       Any exceptions to the charge on the  
17           part of the Defense?

18           MR. GARLAND:    Your Honor, I would except to the  
19           latter part of the charge where Your Honor goes into a  
20           breakdown with exactly how to fill out that form, and  
21           since it does not have a place on there for the  
22           contributory negligence, it looks like that might be  
23           omitted. And although you said it earlier in the charge,  
24           then I guess that's one of my feelings about having that  
25           special verdict, because I am afraid now that

1 overemphasizes that they find the three elements of  
2 damage and lump them into one and then that's it. And  
3 there was no mention there made about subtracting the  
4 percentage of contributory negligence in that final  
5 explanation.

6 THE COURT: Is that it?

7 MR. GARLAND: I would also except, Your Honor, as  
8 to page 8 in giving the so little amount charge there. I  
9 think that --

10 THE COURT: I don't know if you are referring  
11 to a page. I don't know what I gave you all  
12 beforehand would be perfecting the record necessarily.  
13 This won't --

14 MR. GARLAND: That would be specifically the charge  
15 there that says, for the purpose of this action  
16 negligence is a legal cause, no matter how small, in  
17 bringing about an actual cause for the injury to the  
18 Plaintiff, I would object to that, Judge. And then it's  
19 used again in the next sentence there, too, about no  
20 matter how small as being a standard that I contend is  
21 applicable only to the extent of negligence to get the  
22 case to the jury in the first place, and not to just the  
23 general negligence decision.

24 THE COURT: Okay. Anything else?

25 MR. GARLAND: That was it.

1           THE COURT:       Well, I frankly think Mr. Garland  
2           makes a good point about my explanation of the verdict  
3           form. I am going to put them back in there and clarify  
4           that point. I think that's a fair point. Would you put  
5           the Jury back in?

6           (JURY ENTERS COURTROOM)

7           THE COURT:       Ladies and Gentlemen, let me clarify  
8           one point. When I was explaining to you this Jury  
9           Verdict form, of course, it is intended to be merely the  
10          way that you express to us your verdict. And in getting  
11          to your verdict that would be reflected on this piece of  
12          paper that you will have as the form to do so, you should  
13          take into account all of the instructions that I have  
14          given you about the liability issues insofar as  
15          negligence, the affirmative defenses raised by the  
16          railway company insofar as contributory negligence or  
17          mitigation of damages, all those things I have explained  
18          to you as far as the legal principles, the liability, the  
19          defenses, damages, should be taken into account by you  
20          when you reach your verdict. And again that includes,  
21          was the railroad negligent, was any negligence on the  
22          part of the Plaintiff, if so how do you attribute or  
23          apportion that. And to the extent you do apportion some  
24          negligence to the Plaintiff, when you figure out what the  
25          total damages should be, you would reduce those by that

1 percentage that you come up with if you do come up with  
2 any such figure, and then the issue of the damages and  
3 how you would calculate those based on the instructions I  
4 have given you as to those three elements of damage, and  
5 then whether there was mitigation. In other words, all  
6 those things I covered in the charge should be taken into  
7 account when it comes to the point of you reducing it all  
8 down to your verdict that will be reflected on this form  
9 that I have explained to you. So with that  
10 clarification, you may take the jury back to the jury  
11 room and we will have all these items ready for you in a  
12 few minutes.

13 JUROR: May I ask a question?

14 THE COURT: No, ma'am, as much as I want to know  
15 what is on your mind. If you have a question you can  
16 write it down and let the bailiff bring it to me.

17 (JURY LEAVES COURTROOM)

18 THE COURT: Any exceptions on the part of anybody  
19 to the recharge?

20 MR. WETTERMARK: Not from the Plaintiff.

21 MR. GARLAND: Not from the Defendant, I thought  
22 that was appropriate.

23 MR. WETTERMARK: I have heard that, may I ask a  
24 question before.

25 THE COURT: I have, too, and the urge is to say,

1 yes, go ahead.

2 MR. WETTERMARK: I bet she wants a copy of the  
3 written charge.

4 THE COURT: That's entirely possible. All right,  
5 here is the verdict form. Are all the exhibits organized  
6 and -- you all may need -- all right, for the record,  
7 that is a good point. Let me make clear for the record  
8 Defendant's Exhibits 7, 8, 9, and 10, to which there was  
9 an objection stated by the Plaintiff earlier today, I  
10 sustained the objection and will not allow Defendant's  
11 Exhibits 7 through 10 to go out with the Jury. They need  
12 to be in the record, I suppose, but I will not allow them  
13 to go out with the Jury.

14 (DISCUSSION ABOUT EXHIBITS OFF THE RECORD)

15 (Plaintiff's Exhibit 5 was withdrawn)

16 (Plaintiff's Exhibits 41 & 43 were admitted by agreement  
17 between the parties).

18 (Defendant's Exhibits 23 & 30 were admitted by agreement  
19 between the parties).

20 (NOTE FROM JURY)

21 THE COURT: Here it is. "Are we to assume that  
22 the Plaintiff has had no income for three or so years?".  
23 One. "Were all of his medical bills paid by railroad, 100  
24 percent?" First question actually has a thing over to  
25 the side here, "Are we to assume that the Plaintiff has

1 had no income for three or so years except for part-time  
2 job he now holds?". You all are welcome to look at the  
3 note. That just may be her concern.

4 MR. WETTERMARK: How do we answer that?

5 THE COURT: Well, of course, the medical bills, I  
6 told them, that's not part of the case. I mean, that's  
7 just not part of their consideration of the case. It  
8 doesn't matter -- though I think the railroad does pay  
9 them under that deal, or something. I think they got  
10 some kind of agreement they worked out some years ago.

11 MR. GARLAND: I'm afraid you better just say you  
12 can't comment other than what you have said, because I  
13 can't -- I don't think you can really say that in answer  
14 to either one of them. I think on the bills it's pretty  
15 clear. But, in answering that, I don't know what to say,  
16 because -- and it's one thing not allowing evidence of  
17 this other income, but it's another thing to  
18 affirmatively represent that it has been done -- if they  
19 represented --

20 MR. WETTERMARK: Just tell them you can't answer  
21 it.

22 MR. GARLAND: If they represented that in the  
23 case then that would have opened the door for me to prove  
24 that that was not accurate.

25 MR. WETTERMARK: I think what the issue would be

1 the generic response, that you have asked these  
2 questions, say you have to decide the evidence just on  
3 what you have heard, just the evidence you have heard in  
4 the courtroom for the first question.

5 MR. GARLAND: That's for the first. And for the  
6 second one, I guess you can just say medical bills --  
7 just kind of like you said it in your charge --

8 THE COURT: Yes. This is not part of it. Well,  
9 the question is, do I just go stand in the door and tell  
10 them or bring them back in here? I --

11 MR. GARLAND: If you just want to go stand --

12 THE COURT: Well, you all would --

13 MR. GARLAND: That would be fine.

14 MR. WETTERMARK: That would be fine.

15 THE COURT: You would be hearing and seeing  
16 everything I say.

17 MR. WETTERMARK: That's what I was trying -- on  
18 the medical bill question, I think I would agree that in  
19 this case the medical bills aren't an issue in this case,  
20 and so you don't even have to consider them, you should  
21 not consider the past medical bills, that's a simple way.  
22 And on the first question --

23 THE COURT: You rely on the evidence presented to  
24 you during the trial.

25 MR. WETTERMARK: Yes. You have to decide the

1 case on the evidence -- you have come here, you have  
2 heard all the evidence, that's all you can get.

3 THE COURT: You should not assume anything?

4 MR. GARLAND: That's right. I think that's a fair  
5 way to say it.

6 THE COURT: You want me to bring them in here or  
7 just go stand at the door? I've never done the stand at  
8 the door routine, but I just want to get it in their  
9 hands, and get them started.

10 MR. WETTERMARK: Just say your verdict should be  
11 based just on the evidence you heard during the trial and  
12 should not be made on assumptions you make.

13 (JUDGE ANSWERS JURY'S QUESTION STANDING IN THE DOOR OF THE  
14 JURY ROOM IN THE PRESENCE OF BOTH ATTORNEYS).

15 THE COURT: This letter will be made part of the  
16 record.

17 (COURT IN RECESS 3:10 p.m. To 3:50 p.m. WAITING ON VERDICT)

18 THE COURT: I understand we have a verdict.

19 Please bring in the jury.

20 (JURY ENTERS COURTROOM)

21 THE COURT: All right, Members of the Jury, I  
22 understand you have reached a verdict; is that correct?

23 FOREPERSON: Yes.

24 THE COURT: If you will please hand that verdict  
25 form to the Clerk, she'll see if it's in proper form and



1           then publish it.

2           THE CLERK:       In the State Court of Bibb County,  
3           State of Georgia, Civil Action number 45273, Lester E.  
4           Kirkland, Jr., versus Norfolk Southern Railway Company,  
5           we the Jury find for the Plaintiff in the amount of  
6           \$1,924,500 this 21st day of March, 2001, Terry L.  
7           Jenkins, Foreperson.

8           THE COURT:       Any matters to be addressed before  
9           the Jurors are excused?

10          MR. WETTERMARK:   Not from the Plaintiff, Your  
11          Honor.

12          THE COURT:       Mr. Garland?

13          MR. GARLAND:    Not from the Defendant.

14          THE COURT:       All right, Ladies and Gentlemen, this  
15          will conclude your service for this term of court, and  
16          it's -- you have put in three good days, and, as the  
17          attorneys have said, I will say again, we do appreciate  
18          your service to the court here this week. You have been  
19          an attentive jury and on time, and I appreciate your  
20          cooperation in those matters. I think everybody worked  
21          well together to present it to you and keep it moving,  
22          and put it in your hands, so this, as I say, will  
23          conclude your service. Once I step out, and you will  
24          hang around a few minutes, the clerk will give you the  
25          check for your Jury service that you are entitled to

1 under the law. It's not a lot, but it is what the law  
2 provides, it ought to at least cover your parking  
3 tickets, or what not, but she will also be glad to  
4 provide you excuses if you need that for work or school,  
5 as the case may be, just hang around and she will provide  
6 that for you. Sometimes it comes up that the lawyers may  
7 want to talk to you about your verdict, and I tell Jurors  
8 that is something that attorneys or the parties may do.  
9 But it's up to you as to whether you want to talk, if you  
10 prefer not to, you just say, I don't want to talk about  
11 it, that should be the end of the matter. If you don't  
12 object to doing so, though, it's okay for you to do so.  
13 We do ask that it be done -- let us kind of get the  
14 courtroom cleared out, and it will be done out in the  
15 lobby so we can lock up here in the courtroom for the  
16 day. But we do appreciate your service. Hope you will  
17 have a good rest of the week, and may have you back down  
18 sometimes, but again, thank you for your service. We'll  
19 be in recess.

20 COURT ADJOURNED: 3:55 p.m.

CERTIFICATE OF REPORTER

GEORGIA, JONES COUNTY:

I, Julia J. Scarborough, CCR, B-908, CERTIFY that acting in such capacity on March 21, 2001, I reported the trial in the above captioned case held before Hon. William Adams, and on the foregoing pages, numbered 5 through 398, both inclusive, have transcribed a true and accurate transcript of the same.

I FURTHER CERTIFY that I am not counsel for nor related to any of the parties; nor am I interested in the event or the outcome thereof.

WITNESS my hand and official seal this 30th day of April 2001.

Julia J. Scarborough CCR  
Certificate No. B-908 J

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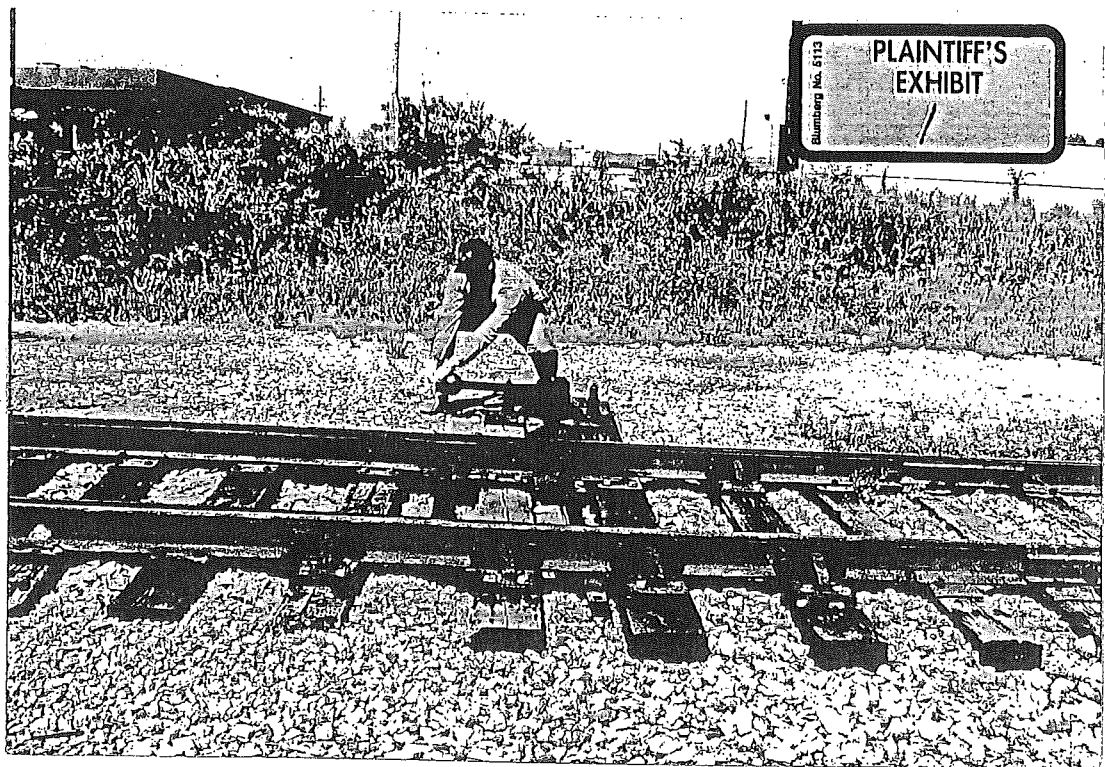
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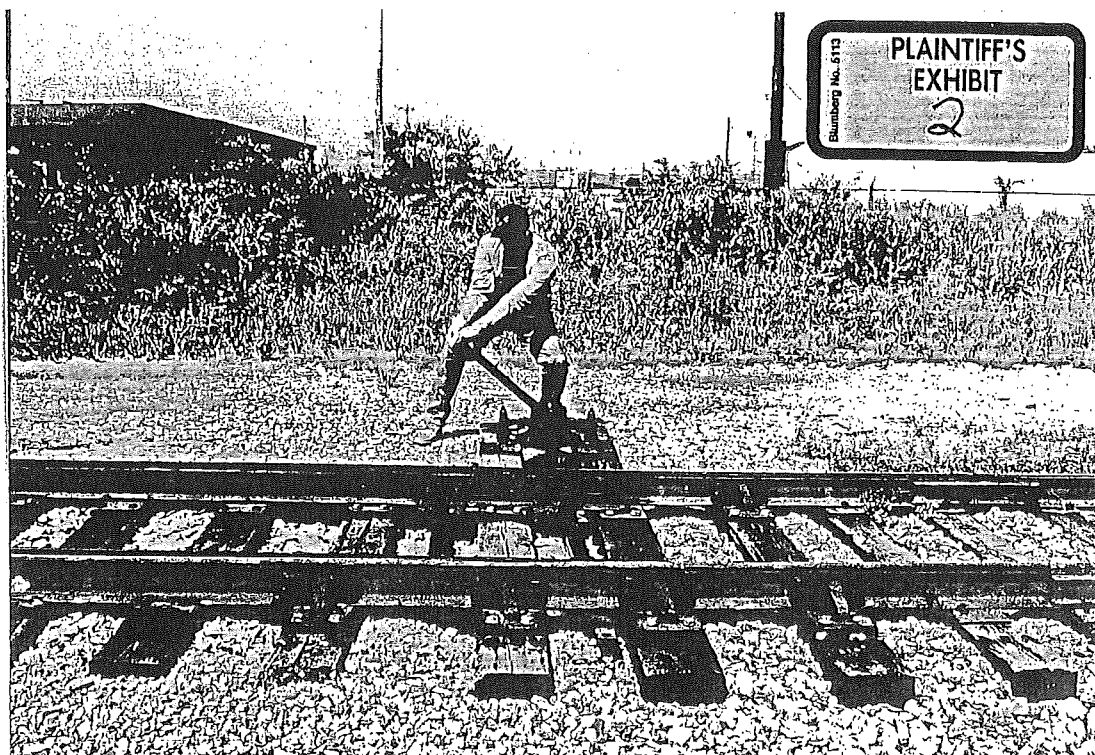
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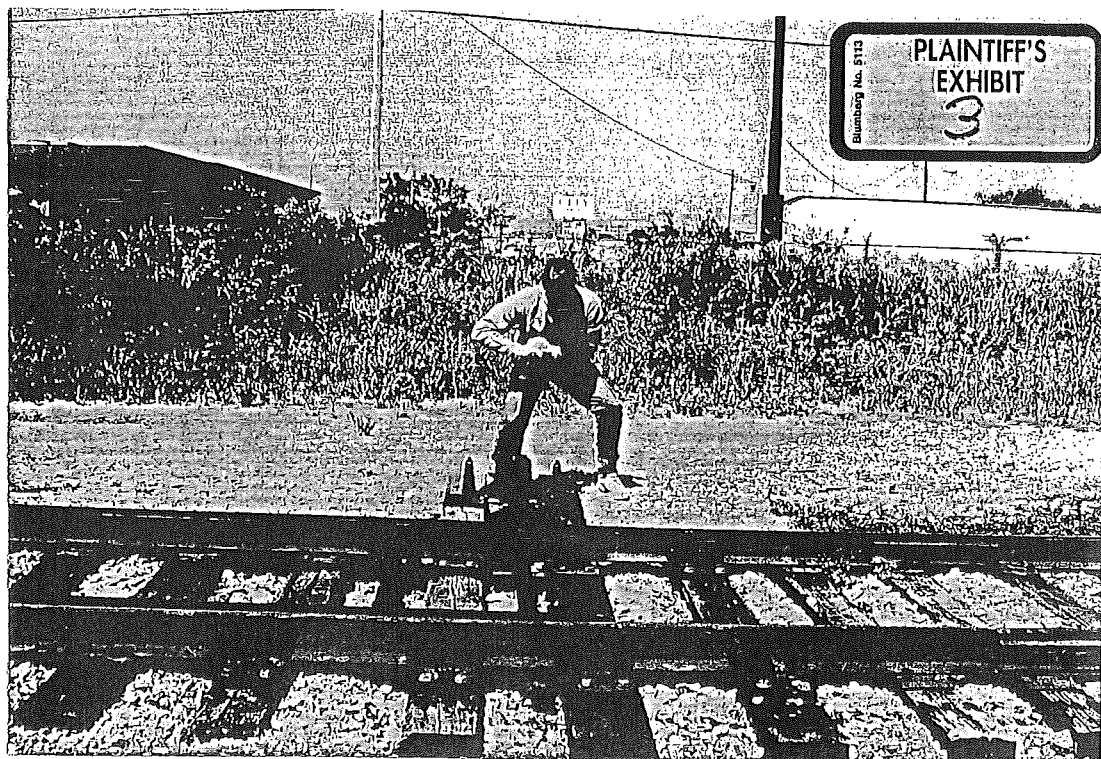
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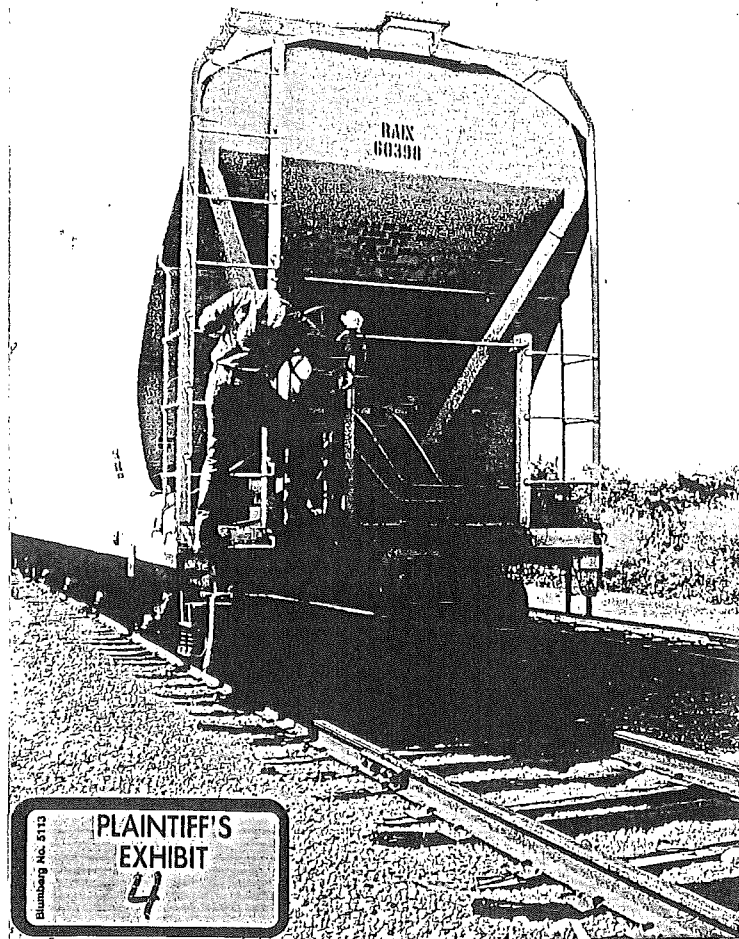
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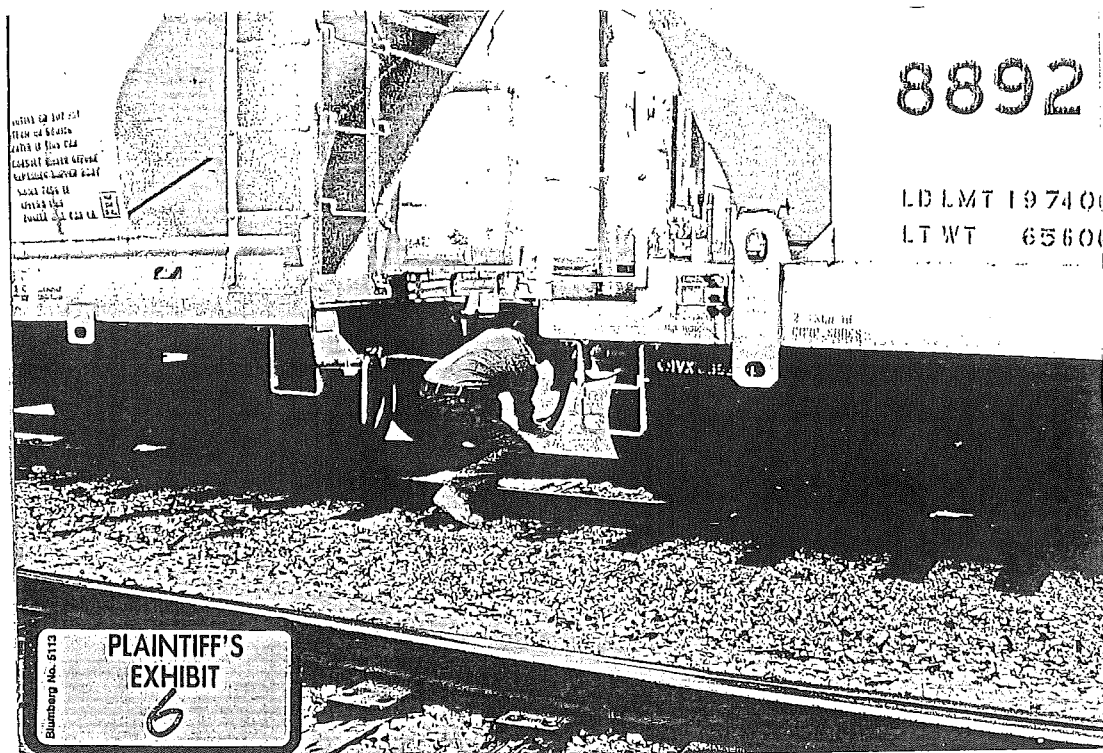
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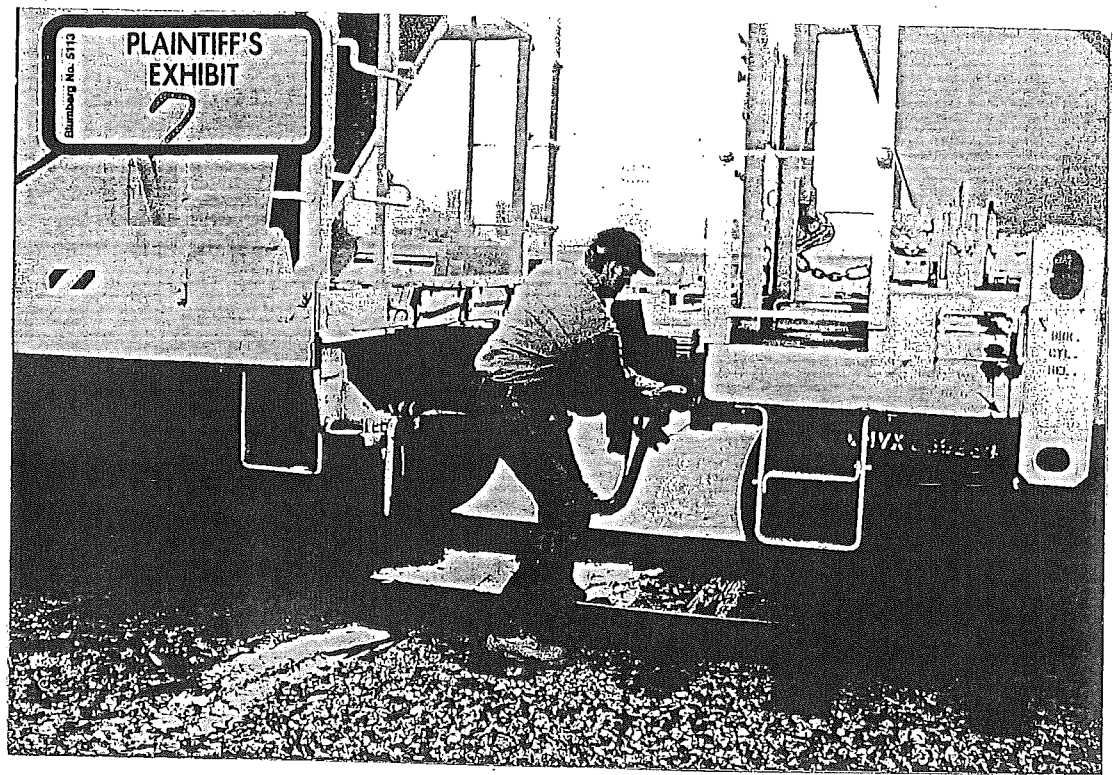
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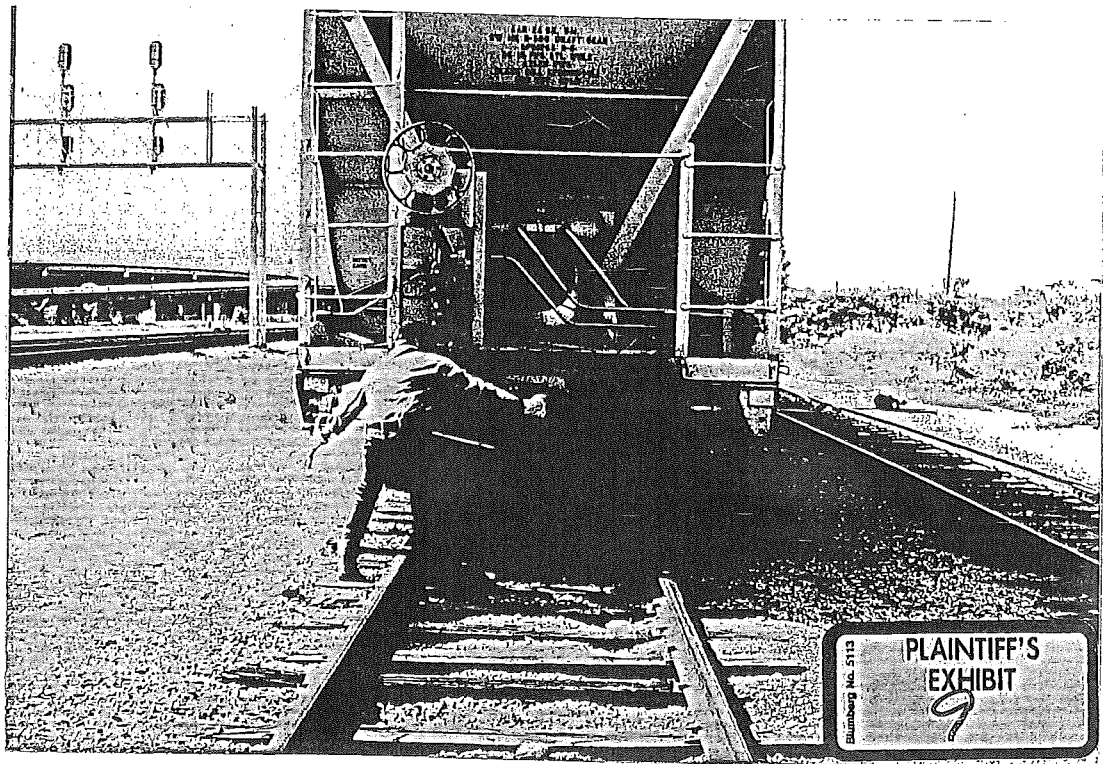
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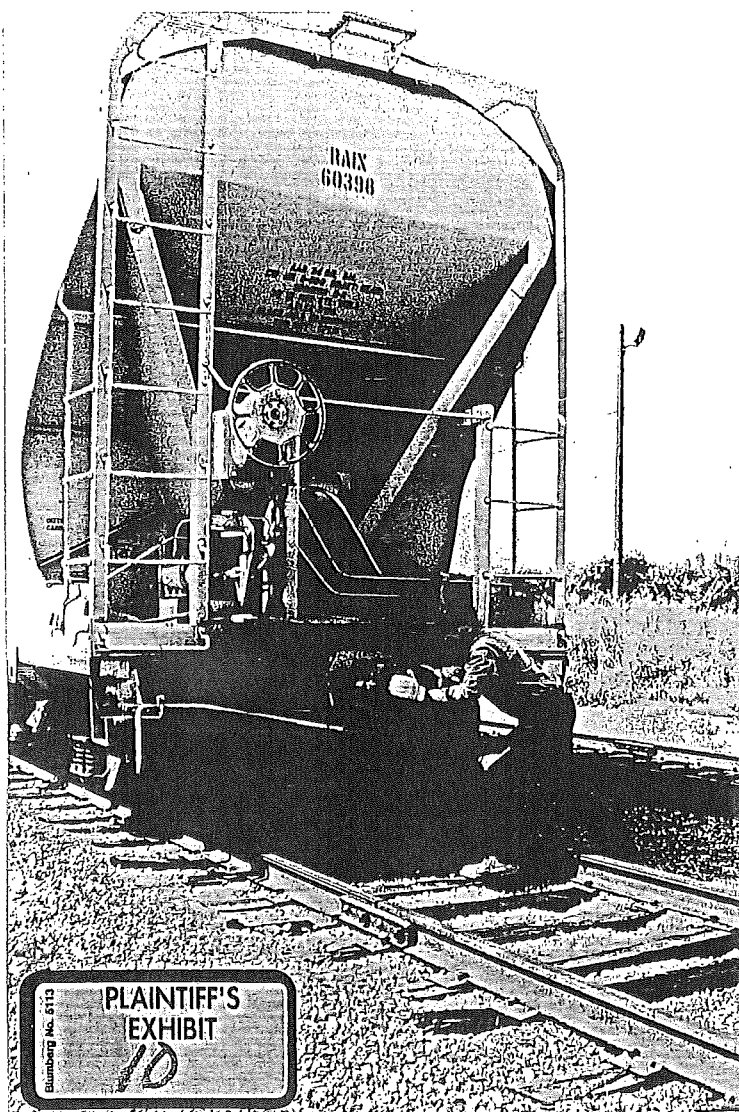


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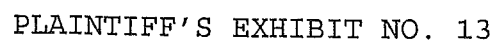
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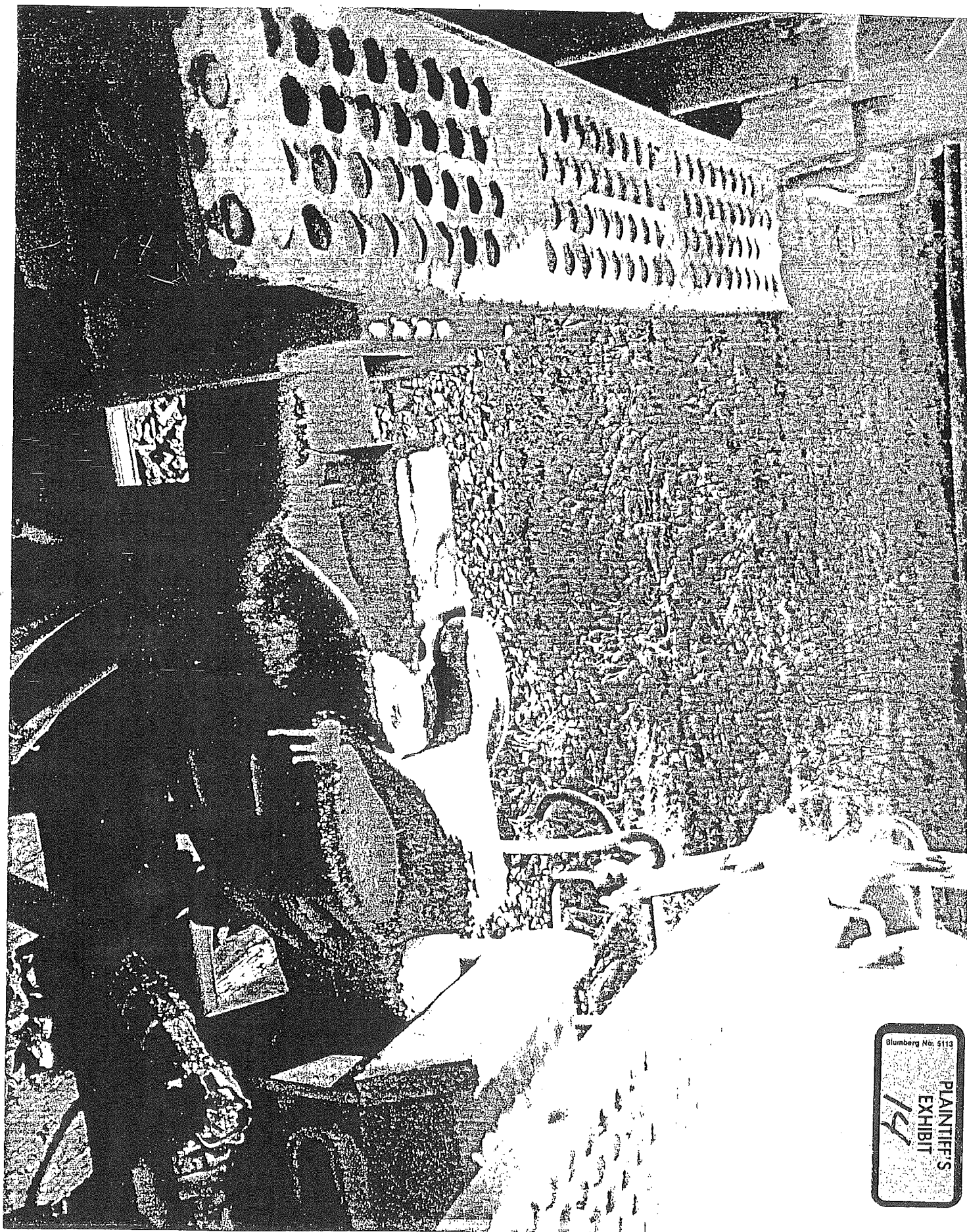


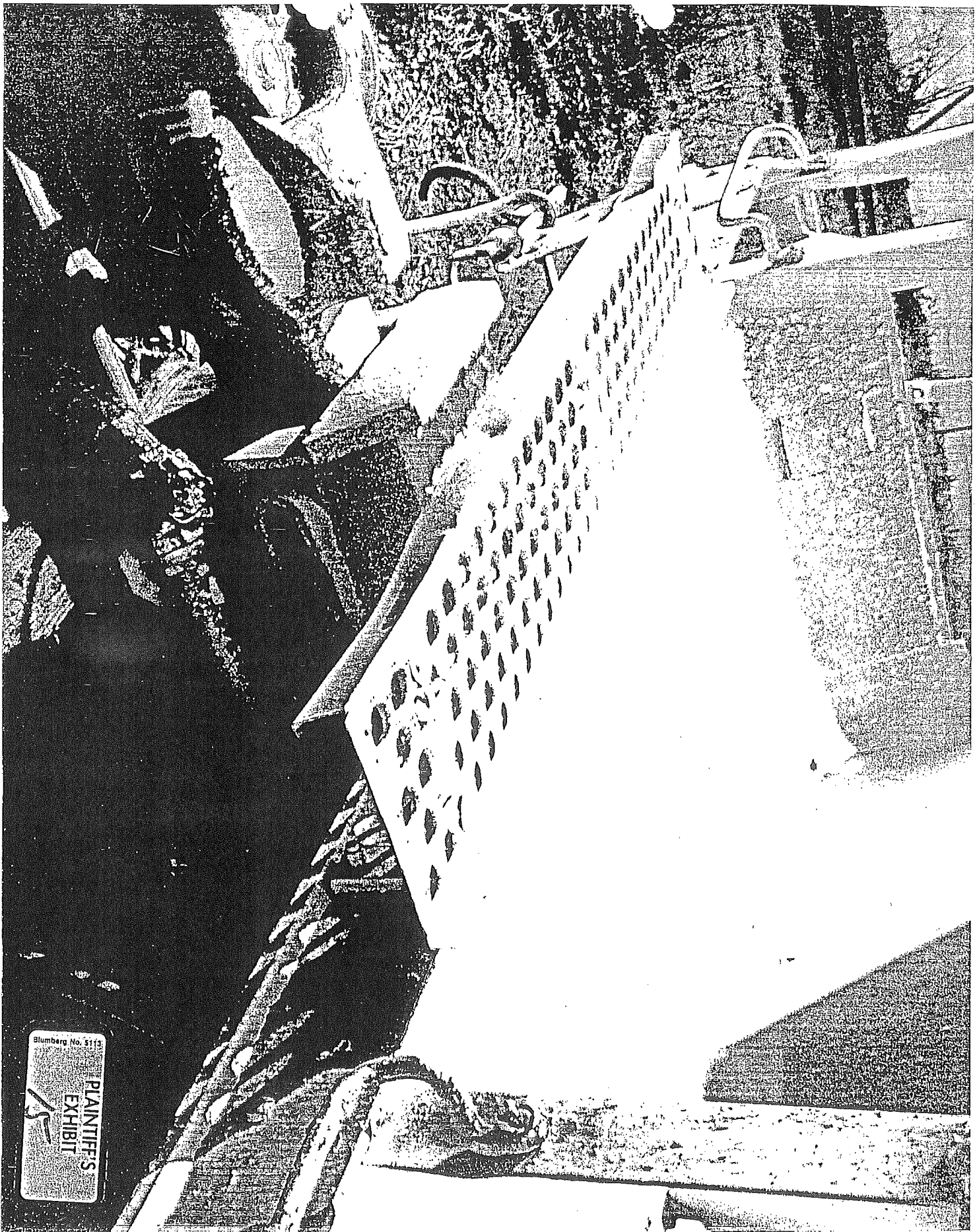


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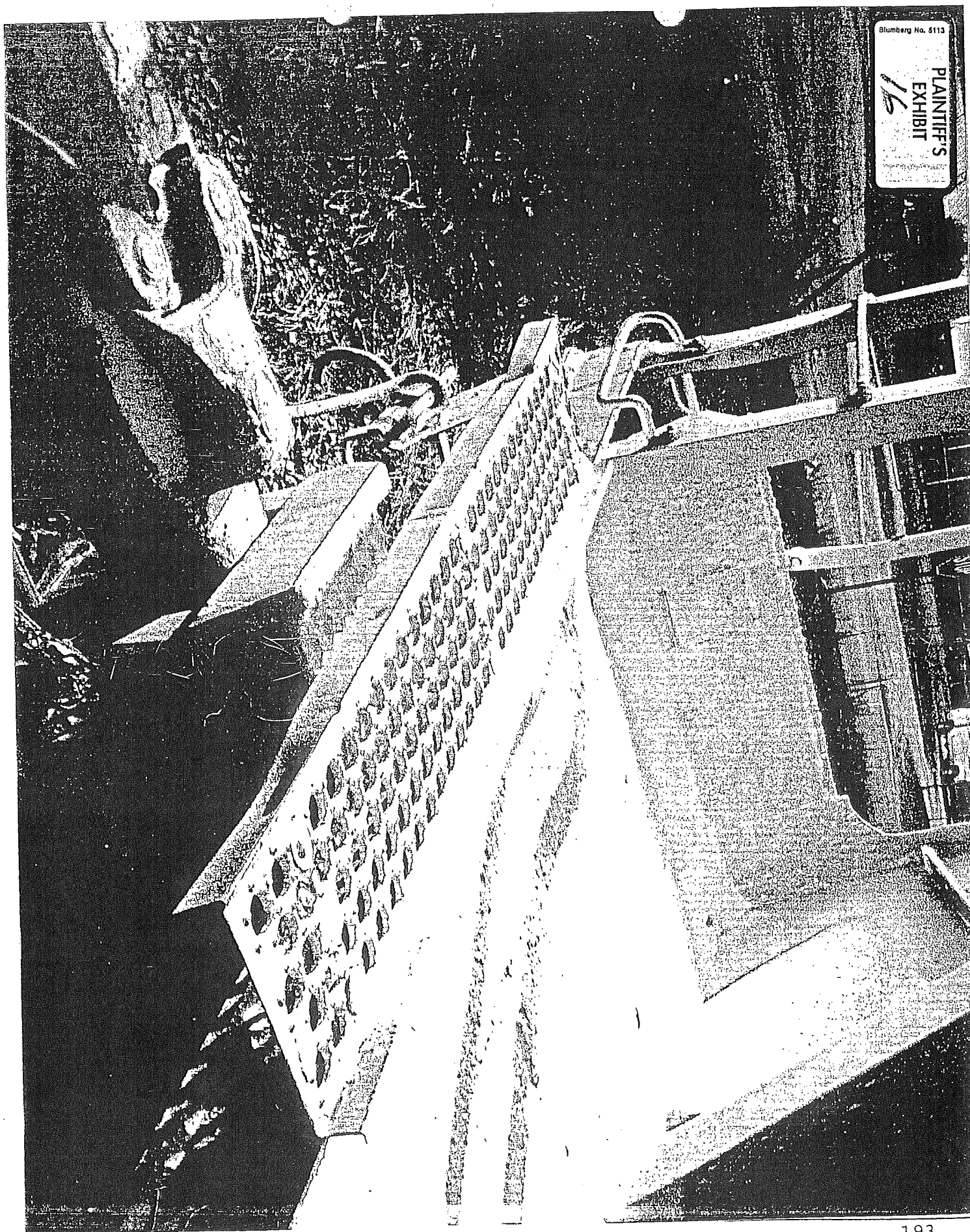


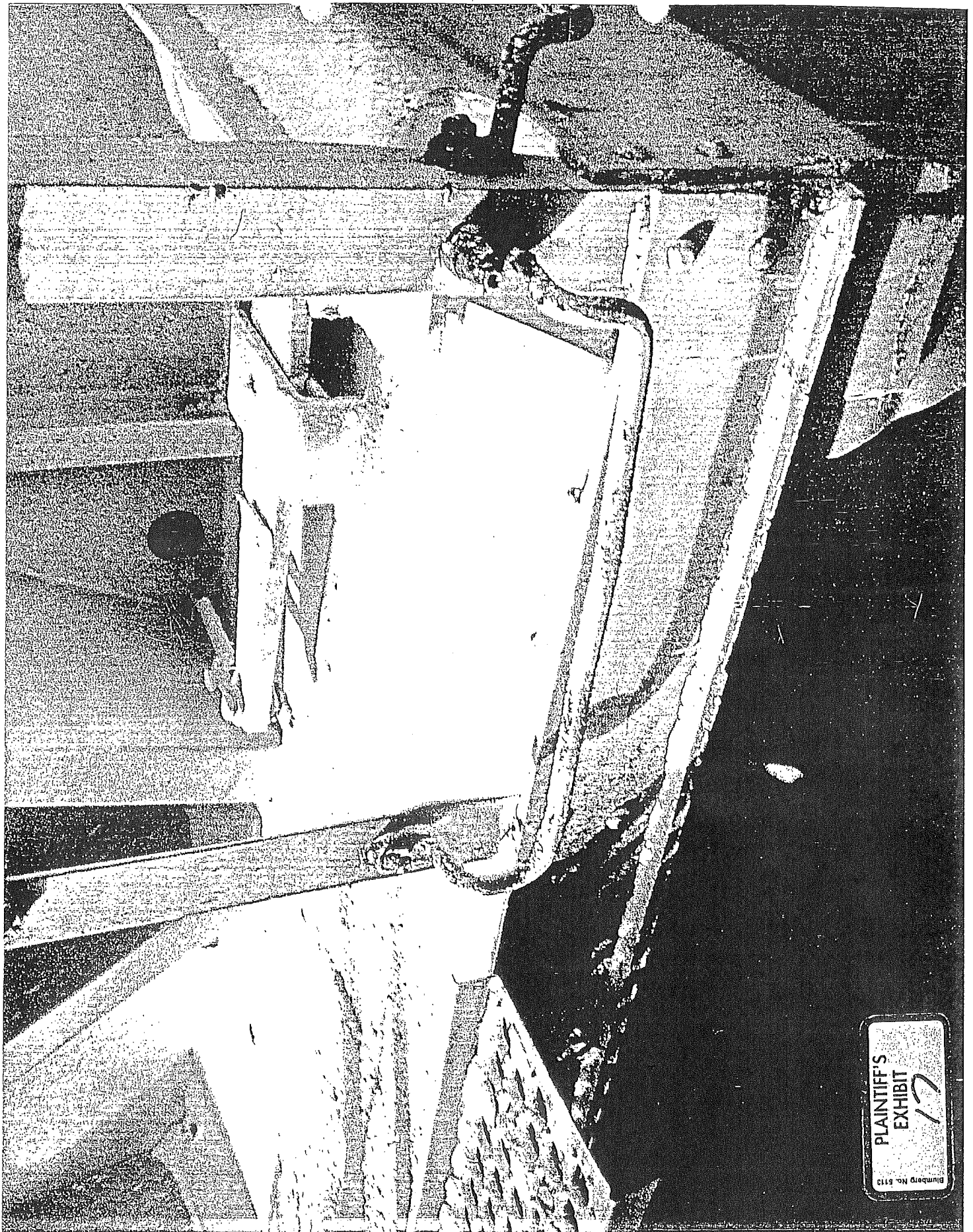












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